

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
HIGHLAND RESERVE LLC, AND MATT C. CALDWELL)	DIVISION OF WATER POLLUTION CONTROL
)	
RESPONDENTS)	CASE NUMBER WPC07-108
)	

ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department" respectively).

II.

Highland Reserve, LLC, is an active limited liability company licensed to do business in the state of Tennessee (hereinafter "Respondent Highland Reserve"). Respondent Highland Reserve is the owner and developer of Highland Reserve Subdivision – Phase I, a residential development of approximately 400 acres in Roane County, Tennessee (hereinafter "the site"). Service of process may be made on Respondent Highland Reserve through Matt C. Caldwell, Registered Agent, at 1000 Waterford Place, Kingston, Tennessee 37763.

III.

Matt C. Caldwell (hereinafter "Respondent Caldwell"), is a resident of Tennessee and is the signatory authority responsible for construction activities at the site. Service of process may be made on Respondent Caldwell at 1000 Waterford Place, Kingston, Tennessee 37763.

JURISDICTION

IV.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act, (the "Act") has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondents are "persons" as defined by T.C.A. § 69-3-103(20) and as herein described, the Respondents have violated the Act.

VI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI).

VII.

The unnamed tributary to Watts Bar Reservoir and Watts Bar Reservoir are “waters of the state,” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, this unnamed tributary is classified for the following uses: fish and aquatic life, livestock watering and wildlife, recreation and irrigation. Watts Bar Reservoir is classified for the following uses: domestic water supply, industrial water supply, fish and aquatic life, livestock watering and wildlife, recreation, irrigation, and navigation. Additionally, Watts Bar Reservoir is listed as having a fish tissue consumption advisory due the presence of contaminated sediments.

FACTS

VIII.

On September 9, 2005, the Division received a NOI and Storm Water Pollution Prevention Plan (SWPPP) from Respondent Highland Reserve, requesting coverage under the TNCGP for construction activities at the site. Respondent Caldwell signed the NOI as Owner/Developer of the site. Coverage under the TNCGP was issued December 7, 2005.

IX.

On December 9, 2005, Division personnel conducted an inspection of the site in order to document any streams on site. During this inspection, Division personnel noted that approximately 20 acres had been cleared and grubbed. No Erosion Prevention and Sediment Control measures (EPSC) were in place at the site and the NOC, SWPPP and EPSC inspection reports were not available on site. Additionally, a watercourse was noted running along the entrance road to the site. This watercourse was not shown in the SWPPP for the site and, based on aquatic life observed, was determined to be a stream.

X.

On December 12, 2005, the Division issued a Notice of Violation (NOV) to Respondent Caldwell for the violations observed during the December 9, 2005, site inspection. The NOV instructed Respondent Caldwell to stabilize the areas and to provide measures for preventing sediment release from additional grading of the site. Respondent Caldwell acknowledged receipt of the NOV on December 15, 2005, and in a response dated January 19, 2006, indicated that corrective measures were being implemented and that the site was intended to be a low-density development.

XI.

On February 7, 2006, a Compliance Review Meeting (CRM) was held at the Knoxville Environmental Field Office (K-EFO) to discuss compliance issues at the site. The requirements of the TNCGP were reiterated to Mr. Caldwell during the CRM.

XII.

On May 16, 2006, the Division received an amended NOI, on which Mr. Gary D. Raymer had signed as the primary contractor for the site.

XIII.

On August 15, 2006, Division personnel met Respondent Caldwell at the site. Division personnel pointed out that the access road to the rear of the site had been left in an unstable condition with no EPSC measures in place, allowing eroded material to migrate into a stream immediately down-gradient. In other areas of the site, EPSC measures had not been maintained. The NOC, SWPPP and EPSC inspection reports were not available on site as required by the TNCGP.

XIV.

On September 15, 2006, the Division issued a NOV to Respondent Caldwell for the violations observed during the August 15, 2006, site inspection. Respondent Caldwell acknowledged receipt of the NOV on September 18, 2006.

XV.

On February 13, 2007, Division personnel conducted a compliance inspection at the site. Division personnel noted that the access road at the rear of the site was still unstable and the EPSC measures installed along the road had not been maintained, allowing eroded material to continue to migrate into the stream at that location. EPSC measures in other areas of the site had also not been maintained and were allowing eroded material to migrate off site. The NOC, SWPPP and EPSC inspection reports were not available on site as required by the TNCGP.

VIOLATIONS

XVI.

By conducting land disturbance activities without coverage under the TNCGP, the Respondents have violated T.C.A. §§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or

addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVII.

By failing to properly install and maintain erosion prevention and sediment control measures at a land disturbance site, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

XVIII.

By failing to post the NOC and SWPPP on site as required under the TNCGP, the Respondents have violated T.C.A. Section 69-3-114(b) as referenced above.

XIX.

By failing to maintain EPSC inspection reports as required under the TNCGP, the Respondents have violated T.C.A. Section 69-3-114(b) as referenced above.

XX.

By causing a condition of pollution to the unnamed tributary to Watts Bar Reservoir and to Watts Bar Reservoir itself, the Respondents have violated T. C. A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

XXI.

During the course of investigating the Respondents activities, the Division incurred damages in the amount of SEVEN HUNDRED FIFTY TWO DOLLARS AND TWELVE CENTS (\$752.12).

ORDER AND ASSESSMENT

XXII.

----- WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-107, 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 30 days of receipt of this ORDER, submit an updated SWPPP, showing the methods proposed to establish effective EPSC measures on-site and to implement Best Management Practices as outlined in the Tennessee Erosion and

Sediment Control Handbook such that sediment is not allowed to leave the site or enter waters of the state. These measures shall consist of, but not be limited to, establishing vegetative cover, grading of severely eroded slopes prior to stabilization attempts, installation of rock check dams, silt fences and sediment basins. These EPSC measures shall be designed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, shall be approved by the Water Pollution Control Manager in the K-EFO, and shall be maintained until all land disturbances at the site are complete and erosion-preventive permanent cover is established. The Respondents shall submit this updated SWPPP to the Water Pollution Control Manager in the K-EFO at 3711 Middlebrook Pike, Suite 220, State Plaza, Knoxville, Tennessee 37921, and shall submit a copy to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within 60 days of approval of the activities outlined in item 1 above, complete those activities and submit photographic and written documentation of the completion of those activities to the Water Pollution Control Manager in the K-EFO and shall submit a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.
3. The Respondents shall commence no other land disturbance activities at the site unless those activities are required in order to achieve compliance with this ORDER and the Act. Once compliance has been achieved and the site is stabilized, additional land disturbance activities may resume after approval of those activities by the Water Pollution Control Manager in the K-EFO.

4. The Respondents shall, within one year of receipt of this ORDER, attend a Fundamentals of Erosion Prevention and Sediment Control Workshop provided by the Tennessee Department of Environment and Conservation, and submit documentation of successful completion to the K-EFO and a copy to the E&C Section, at the respective addresses above. The Respondents should obtain certification for all supervisory level personnel who are expected to be responsible for land disturbance activities or erosion prevention and sediment control at the site. Information may be found on the program website at <http://www.tnepsc.org/>.
5. The Respondents shall pay DAMAGES to the Division in amount of SEVEN HUNDRED FIFTY TWO DOLLARS AND TWELVE CENTS (\$752.12).
6. The Respondents shall pay a CIVIL PENALTY of FORTY TWO THOUSAND DOLLARS (\$42,000.00) to the Division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00).
 - b. If the Respondents fail to comply with Part XXII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of NINE THOUSAND DOLLARS (\$9,000.00), payable within 30 days of default.
 - c. If the Respondents fail to comply with Part XXII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of NINE THOUSAND DOLLARS (\$9,000.00), payable within 30 days of default.

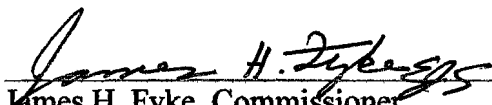
- d. If the Respondents fail to comply with Part XXII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of NINE THOUSAND DOLLARS (\$9,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XXII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of THREE THOUSAND DOLLARS (\$3,000.00), payable within 30 days of default.
- f. In the event of default of items 1 - 4, the Respondent is hereby assessed an additional penalty in the amount FIVE HUNDRED DOLLARS (\$500.00) for each and every day the default continues. Said additional penalties are due and payable to the Department as they accrue.
- g. For good cause demonstrated by the Respondent for missing a deadline set out in the Order, the Commissioner may waive the requirement that a penalty assessed by paragraph (6)(f) be paid

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director may, for good cause shown, extend the compliance dates contained within ~~this ORDER. In order to be eligible for this time extension, the Respondents shall submit a~~ written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 26th day of June, 2007.


James H. Pyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115, allow the Respondents to secure review of this ORDER AND ASSESSMENT. To secure review of this ORDER AND ASSESSMENT, the Respondents must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondents must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER

AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondents may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented by any legal proceeding resulting from an appeal of this ORDER and ASSESSMENT by an attorney licensed to practice law in the state of Tennessee.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the ORDER and ASSESSMENT. This includes the authority to modify the penalty within the statutory confines (up to \$10,000 TEN THOUSAND DOLLARS per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department, including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to Patrick N. Parker, Assistant General Counsel at the address listed below. All other correspondence shall be sent to Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534. The case number, WPC07-108 should be written on all correspondence regarding this matter.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Patrick N. Parker, Assistant General Counsel, Tennessee Department of Environment and Conservation, 401 Church Street, 20th Floor, L&C Tower, Nashville, TN 37243-1548.

The case number, WPC07-108, should be included on or with the payment.

A handwritten signature in black ink, appearing to be 'P. Parker', written over a horizontal line.

Patrick N. Parker
Tennessee Department of Environment
& Conservation
401 Church Street
L & C Tower, 20th Floor
Nashville, TN 37243-1548